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IN THE SUPREME COURT OF THE UNITED STATES

NO. 85-7087 (2)

WILLIAM THEODORE BOLIEK,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSOURI

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26/86

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1985
NO. _____

RICHARD ZEITVOGEL,
Petitioner,
v.
STATE OF MISSOURI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSOURI

William Theodore Bollek, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Missouri, in the case styled "State of Missouri v. William Theodore Bollek, No. 66684 ."

OPINION BELOW

The opinion of the Supreme Court of the State of Missouri, in the case styled "State of Missouri v. William Theodore Bollek, No. 66684," the case for which certiorari is being sought, was filed on March 25, 1986, appears at 706 S.W.2d 847 (Mo. banc 1986), and may be found in the Appendix at pages 11-16. (References to the Appendix will heretofore be cited as App. ____). The Missouri Supreme Court denied Petitioner's timely motion for rehearing on April 15, 1986, at the same time set Petitioner's death penalty execution date for June 19, 1986 (App. 21-22).

JURISDICTION

On March 25, 1986, an opinion rendered by the Supreme Court of Missouri affirmed Petitioner's judgment and conviction for Capital Murder and his sentence of death (App. 11-16). Petitioner duly filed his Motion for Rehearing, which was denied by

the Missouri Supreme Court on April 15, 1986 (App. 21-22). On April 15, 1986, the Missouri Supreme Court also set Petitioner's execution date for June 19, 1986 (App. 21-22). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS

The Constitutional Provisions involved are the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

QUESTIONS PRESENTED FOR REVIEW

1. Is the Confrontation Clause violated by the admission of a murder victim's hearsay statements allegedly falling under the victim's state of mind exception to the hearsay rule when the victim's state of mind is not relevant to the offense?
2. Should this Court's opinion in Lockhart v. McCree, 39 Cr.L.Rptr. 3085 (1986), permit the state's interest in efficient trial management to outweigh the defendant's constitutional rights in a death penalty case?

STATEMENT OF THE CASE

Petitioner was convicted of capital murder, Section 565.001, RSMo 1978, for which he was sentenced to death in accordance with the verdict.

Evidence favorable to the verdict indicated that in August of 1983, petitioner was living with his lover Jill Harless, Linda Turner, Turner's brother Don Anderson, and Vernon Wait. During a visit to her sister Jill, the victim, Jody Harless, together with petitioner, Wait and Anderson, robbed the home of one Stan Gray at gunpoint. Fearing retaliation from Gray, appellant and Wait acquired a 12 gauge shotgun and a .410 sawed-off shotgun and discussed the necessity of "getting rid of the witnesses" to the robbery. Upon learning that the police sought to question Jody Harless, appellant, Wait and the Harless sisters left Kansas City for Thayer, Missouri, robbing a liquor store in Nevada, Missouri en route (App. 12). At a rest stop, as Jody Harless was walking

back to the car, appellant took the 12 gauge shotgun from the car and shot her in the stomach. The victim continued to walk toward him, pleading with him not to "do it." Wait forced her to the ground, and appellant shot her again. Appellant told Jill Harless he had fired the second shot into the victim's mouth and neck so that identification of the body would be impossible. The body was found some time later with two live .410 shotgun shells and two expended 12 gauge shotgun shells near the body. The body was identified through dental records, and indicated that death had been caused by a shotgun wound to the head (App. 12).

At trial, appellant asserted that he did not know the gun was loaded when he fired the first shot, and that the second shot was fired by Wait (App. 12).

REASONS TO GRANT THE WRIT

QUESTION PRESENTED 1

THE CONFRONTATION CLAUSE IS VIOLATED BY THE ADMISSION OF A MURDER VICTIM'S HEARSAY STATEMENTS ALLEGEDLY FALLING UNDER THE VICTIM'S STATE OF MIND EXCEPTION TO THE HEARSAY RULE WHEN THE VICTIM'S STATE OF MIND IS NOT RELEVANT TO THE OFFENSE.

Petitioner submits that the admission of the murder victim's hearsay statements to show her state of mind violated the Confrontation Clause of the Sixth Amendment, applied to the states through the Fourteenth Amendment, because the victim's state of mind in this case was not relevant to the proof of this offense.

The trial court in this case permitted testimony from two witnesses that the victim, Jody Harless, had stated in the days preceding her departure from Kansas City, that she feared appellant was going to kill her (App. 14). The Missouri Supreme Court upheld the trial court's determination in this matter on the grounds that while such statements are generally admitted only when they are relevant and their relevancy outweighs their prejudicial effect, the trial court was in the best position to

determine the probativeness and prejudicial effect of the evidence. Id.

Petitioner submits that the admission of the victim's hearsay statements in this case constituted a violation of the Confrontation Clause. In Ohio v. Roberts, 448 U.S. 56, 65-66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), this Court indicated that the Confrontation Clause mandates that two requirements be met for the admission of hearsay statements: first, the declarant must be shown to be unavailable, and second, the statement must bear adequate "indicia of reliability" as where the statement falls within a firmly rooted hearsay exception. The first requirement is a rule of necessity reflecting the Framers' preference for face-to-face accusation; the second flows out of the underlying purpose of the Confrontation Clause, namely, to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence. Id. Although the first requirement need not always be met, e.g. Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), the requirement of adequate indicia of reliability appears essential to the Confrontation Clause. Moreover, with regard to the relationship between the hearsay rules and the Confrontation Clause, they protect similar values, California v. Green, 399 U.S. 149, 155, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), and stem from the same roots, Dutton v. Evans, 400 U.S. at 86.

The Missouri Supreme Court noted that although hearsay statements of a declarant's present mental condition are generally excepted from the hearsay rule, such statements are ordinarily admitted only where they are relevant and their relevancy outweighs their prejudicial effect (App. 14). See United States v. Brown, 490 F.2d 758 (D.C. Cir. 1974); State v. Singh, 586 S.W.2d 410, 419 (Mo.App. 1979). As indicated in Judge Blackmar's opinion concurring in part and dissenting in part, however, the victim's statements in this case were not relevant.

The defendant here did not claim self-defense, in which case testimony as to the victim's fear would have tended to demonstrate that the victim was not an aggressor (App. 16). Rather, petitioner's theory was of accidental discharge not occasioned by the actions of the victim. Thus, the victim's statements that she feared petitioner does not logically refute petitioner's claim that his shotgun accidentally discharged.

In addition to the statements being irrelevant, they were clearly highly prejudicial. In closing argument, the state used the victim's statements in the following way: "Jody Harless, one of her last words was 'Ted Bollek's gonna blow my head off.' And he did it." (Tr. 553). The state thus used the victim's statements not to show her state of mind but to show petitioner's guilt and state of mind and to characterize him as having terrorized the victim prior to her death. Even if the victim's statements were remotely relevant, petitioner submits their relevancy was outweighed by their prejudicial effect, and that hence they should not have been admitted as falling under the declarant's state of mind hearsay exception.

Petitioner contends that his right to confrontation guaranteed by the Sixth Amendment was violated by the admission of the murder victim's statements indicating her fear of him, because the victim's state of mind was not relevant to prove the offense and thus such statements did not fall under a hearsay exception. This case provides the Court an opportunity to elucidate the relationship between the hearsay rule with its exceptions and the Confrontation Clause.

QUESTION PRESENTED 2

THIS COURT'S OPINION IN LOCKHART V. MCCREE, 39 CR. L. RPTR. 3085 (1986) SHOULD NOT BE INTERPRETED TO PERMIT THE STATE'S INTEREST IN EFFICIENT TRIAL MANAGEMENT TO OUTWEIGH THE DEFENDANT'S CONSTITUTIONAL RIGHTS IN A DEATH PENALTY CASE.

In the recent case of Lockhart v. McCree, supra, this Court held that the Constitution does not prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial. 39 Cr. L. Rptr. at 3086. In so doing, the principal opinion was accused by the dissent of permitting the state's interest in effective trial management to outweigh the defendant's constitutional rights. 39 Cr. L. Rptr. at 3096-97. Petitioner submits that the broad language utilized by this Court in McCree can and should be narrowed to avoid such a result, and that this case is an appropriate vehicle for such narrowing.

In McCree, this Court viewed the criminal defendant's argument supporting his fair cross-section challenge as dealing with the composition of petit juries. 39 Cr. L. Rptr. at 3088; see also Taylor v. Louisiana, 419 U.S. 522, 538 (1975). A related argument, one proposed by petitioner on appeal to the Missouri Supreme Court, views the fair cross-section challenge to be directed toward the resulting pool after challenges for cause have removed from the initial venire panel those unfit to serve on a jury. As this refined pool is that from which the petit jury is ultimately chosen, petitioner contends that it is this body which the Sixth Amendment requires must comprise a representative cross-section of the community. As written, McCree could be interpreted to reject petitioner's argument; petitioner submits that this case provides the Court the opportunity to narrow the broad language of McCree.

In McCree, this Court indicated that the Witherspoon-excludables in that case did not constitute a "distinctive group" for the purposes of the fair cross-section requirement. 39 Cr. L. Rptr. 3088-89. Quoting Taylor v. Louisiana, 419 U.S. 522, 530-531, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), the Court identi-

fied such purposes as (1) "guard[ing] against the exercise of arbitrary power" and ensuring that the "commonsense judgment of the community" will act as "a hedge against the overzealous or mistaken prosecutor," (2) preserving "public confidence in the fairness of the criminal justice system," and (3) implementing the Court's belief that "sharing in the administration of justice is a phase of civil responsibility." 39 Cr. L. Rptr. 3088. The Court apparently viewed Witherspoon-excludables as individuals who have independently chosen for unknown reasons to adopt beliefs contrary to the rule of law, and, by implication, the community to which they belong. --39 Cr. L. Rptr. 3089. ("'Witherspoon-excludables' are singled out for exclusion in capital cases on the basis of an attribute that is within the individual's control [T]he group of 'Witherspoon-excludables' includes only those who cannot and will not conscientiously obey the law").

Petitioner contends, however, that insofar as Witherspoon-excludables have adopted their views regarding the death penalty for reasons of conscience, whether religious or moral, they do in fact constitute a "distinctive group" for fair cross-section purposes as announced in Taylor, *supra*. Where individuals have adopted such views for reasons of conscience, they are not merely personal beliefs, *see* Welsh v. United States, 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970); United States v. Seeger, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965), which can be dismissed as "within the individual's control." Moreover, at least insofar as they are religious or quasi-religious, they represent the views of one segment of the community which is needed to guard against the arbitrary use of power by others whose views may be represented by the prosecutor. To remove those who for reasons of conscience could not impose the death penalty from the guilt phase of a capital trial effectively eliminates from the administration of justice in such cases the

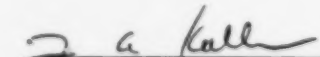
input of such traditional religious bodies as the Quakers and Church of the Brethren, as well as input of others who abhor the death penalty for moral reasons, and thereby throws into question the fairness of the criminal justice system. As in this case petitioner raised on appeal the moral and/or religious basis for the views of at least one Witherspoon-excluded venireman, this case would provide the Court the opportunity to narrow its holding in McCree to those whose opposition to the death penalty is not to be based on conscience, and who therefore do not belong to a distinctive group for fair cross-section purposes.

Petitioner also points out that granting certiorari in this case would permit the Court to correct its error in characterizing Witherspoon-excludables as "unable to follow the law." 39 Cr. L. Rptr. 3089. As such individuals have expressed scruples only with regard to punishment, they are clearly still able to follow the law as to the determination of guilt in a capital case. Moreover, even as to punishment, so long as the law permits a jury to sentence disjunctively either death or imprisonment, and does not mandate the death penalty, a juror who would impose a sentence of imprisonment only would nonetheless follow the law.

CONCLUSION

For the reasons set forth in the Petition, Petitioner respectfully submits that the Court should issue a writ of certiorari to the Missouri Supreme Court in order to review the issues raised herein.

Respectfully submitted,


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IN THE
SUPREME COURT OF THE UNITED STATES

NO. _____

WILLIAM THEODORE BOLIEK,
Petitioner,
v.
STATE OF MISSOURI,
Respondent.

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI TO
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a.—State v. Boliek.

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STATE of Missouri, Respondent,
v.

William Theodore BOLIEK,
Jr., Appellant.

No. 66684.

Supreme Court of Missouri,
En Banc.

March 25, 1986.

Defendant was convicted of capital murder by a jury in the Circuit Court, Camden County, Dean Whipple, J., and he appealed. The Supreme Court, Welliver, J., held that: (1) allowing arresting officer to testify that he made felony stop was proper; (2) sister of murder victim charged in separate indictment from defendant was eligible to be State witness; (3) statements that victim feared defendant was going to kill her were admissible to show her present mental condition; and (4) imposition of death penalty was not excessive or disproportionate to penalty assessed in similar cases.

Affirmed.

Blackmar, J., filed opinion concurring in part and dissenting in part.

1. Constitutional Law ¶267

Jury ¶33(2.1)

Excluding prospective jurors who would not consider death as possible punishment for the crime charged does not violate the Sixth and Fourteenth Amendments of the United States Constitution as well as Article 1, section 5 of the Missouri Constitution and V.A.M.S. § 546.130. V.A.M.S. Const. Art. 1, § 5; U.S.C.A. Const. Amends. 6, 14.

2. Criminal Law ¶1036.1(3)

Admission of testimony that defendant convicted of capital murder possessed knife was not plain error under V.A.M.R. 29-12(b) where defendant's own attorney elicited such testimony and no request was

made to have jury instructed to disregard reference to knife.

3. Criminal Law ¶1036.4

Allowing State to display a .410 shotgun before jury in order to aid jury in visualizing testimony concerning weapon and shells found was not plain error, although that gun was not murder weapon, as it was in coparticipant's possession at time of murder and .410 shotgun shells were found at scene of crime.

4. Criminal Law ¶374

Statement by one of arresting officers that he made a "felony stop" was not an impermissible reference to armed robbery committed by defendant charged with murder, where jury was not informed of armed robbery of gas station or that felony stop was reference to another crime and could have presumed that officer made felony stop for crime under consideration.

5. Witnesses ¶90

Sister of murder victim charged in separate indictment from murder defendant was not ineligible to be State witness.

6. Criminal Law ¶419(1)

Testimony of two witnesses that victim stated that she feared defendant was going to kill her was admissible under hearsay exception for statements of declarant's present mental condition made out of court.

7. Criminal Law ¶649(1)

Court's denial of overnight continuance in murder trial, but allowance of 30-minute recess and upon reconvention, adjournment until following morning at 9 a.m., was not abuse of discretion.

8. Criminal Law ¶1213.8(8)

Imposition of death as punishment for capital murder was not cruel and unusual punishment under U.S.C.A. Const. Amend. 8 and V.A.M.S. Const. Art. 1, § 21.

9. Homicide ¶354

Finding of aggravating circumstances for defendant convicted of capital murder was supported by substantial evidence; jury found defendant killed victim intending to elicit State witness to robbery commit-

ted by defendant and two others, defendant and coparticipant in robbery decided to take victim away after they learned police were looking for her, and several witnesses testified they heard coparticipant say he wanted to kill victim because of what she had seen.

10. Homicide ¶354

Death sentence was not excessive or disproportionate to penalty assessed in similar cases under V.A.M.S. § 565.014, subd. 3, par. 9 (Repealed); evidence showed that defendant wounded victim, she pled for her life, and then, while companion flung and held her to the ground, defendant shot the victim in the head with a 12-gauge shotgun held close to her face.

C.J. Larkin, Columbia, for appellant.

William L. Webster, Atty. Gen., Victorine R. Mahon, Asst. Atty. Gen., Jefferson City, for respondent.

WELLIVER, Judge.

Appellant, William Theodore Boliek, Jr., was convicted of capital murder, § 565.001, RSMo 1978 (now repealed) and the jury, having found the aggravating circumstances required by law, imposed the death sentence. He appeals from his conviction and sentence, urging numerous grounds for reversal. We have exclusive appellate jurisdiction. Mo. Const. art. V, § 3. We affirm.

In August of 1983, appellant was living in Linda Turner's home. Aside from Turner, other residents of the household included appellant's lover Jill Harless, Turner's brother Don Anderson, and Vernon Wait. The victim, Jody Harless, arrived to visit her sister, Jill, and stayed at the Turner home. One Friday evening, appellant, Wait, Anderson, and Jody Harless robbed the home of an acquaintance, Stan Gray, at gunpoint. Afterward, fearing retaliation from Gray and his friends, appellant acquired a 12 gauge shotgun, and Wait acquired a .410 sawed off shotgun. Appellant and Wait began to discuss the necessity of "getting rid of the witnesses" to the robbery. Learning that the police wanted

to speak with the victim, appellant, Wait, and the Harless sisters left Kansas City on the following Monday.

Appellant convinced the others to drive to Thayer, Missouri, and hide out with appellant's parents. Appellant brought the 12 gauge shotgun and shells and Wait brought the .410 shotgun and shells. While en route to Thayer, appellant and Wait robbed a liquor store in Nevada, Missouri.

Later that night, the group made a rest stop along Route M in Oregon County. After the car stopped, Jody Harless walked away from the car. When she began walking back toward the vehicle, appellant took the 12 gauge shotgun from the auto, and shot her. The victim grabbed her stomach but continued walking toward appellant. She began to plead with appellant, "Please don't do it. No Ted, please don't do it." Wait grabbed the victim and forced her to the ground, and appellant shot the victim again. Appellant told the victim's sister that he had fired the second shot into the victim's mouth and neck so identification of the body would be impossible.

Appellant was arrested September 6, 1983, in Decatur, Illinois, for an armed robbery of a gas station committed earlier that day. When arrested, appellant had in his possession 12 gauge shotgun shells and the 12 gauge shotgun used to kill Jody Harless. Appellant managed to escape from custody but was recaptured.

A rancher riding his fenceline discovered the body of Jody Harless September 10, 1983, 28 feet from Highway M in Oregon County, Missouri. Police investigators arrived and discovered two live .410 shotgun shells and two expended 12 gauge shotgun shells near the body. The victim's decomposed body, unidentifiable by viewing, later was identified through dental records. The victim had been killed by a shotgun wound to the head.

At trial, appellant claimed that when he fired the first shot he did not know the gun was loaded. The second shot, according to appellant, was fired by Wait. The jury

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Wait. The jury

found appellant guilty of capital murder
and imposed the death sentence.

I

[1] Appellant first contends that ex-
cluding prospective jurors who would not
consider death as a possible punishment for
the crime charged violates the Sixth and
Fourteenth Amendments of the United
States Constitution, as well as Article I,
§ 5 of the Missouri Constitution and § 546-
130, RSMo 1978. The exclusion of prospec-
tive jurors who indicate they would not
consider imposing the death penalty has
been held to be constitutional by the Su-
preme Court. *Lockett v. Ohio*, 438 U.S.
586 (1978). We consistently have approved
challenging for cause prospective jurors
who indicate that they cannot impose the
death sentence. *State v. Gilmore*, 697
S.W.2d 172 (Mo. banc 1985); *State v. Ma-
lone*, 694 S.W.2d 723 (Mo. banc 1985);
State v. Johns, 679 S.W.2d 253 (Mo. banc
1984).

II

[2] Appellant raises several evidentiary
issues. Initially, appellant argues that the
admission of testimony indicating that he
possessed a knife was irrelevant and preju-
dicial. Since appellant has failed to pre-
serve this point, we review it under the
plain error rule. Rule 29.12(b). Appel-
lant's own attorney elicited this testimony,
and no request was made to have the jury
instructed to disregard the reference to a
knife. Under these circumstances, there
was no error on the part of the trial court
in not, *sua sponte*, giving an instruction to
disregard this evidence.

III

[3] Appellant further argues that the
trial court erred when it allowed the state
to display a .410 shotgun before the jury.
We again must review this issue under the
plain error rule, because appellant failed to
preserve the objection. Although this gun
was not the murder weapon, it was in
Wait's possession at the time of the mur-
der, and there were .410 shotgun shells

found at the scene of the crime. The weap-
on was never introduced into evidence. It
only was used to aid the jury in visualizing
the testimony concerning this weapon and
the shells found where the victim was
killed. There was no error and the point is
denied.

IV

[4] Next, appellant contends that the
trial court committed prejudicial error by
allowing one of the arresting officers to
testify that he made "a felony stop." Ap-
pellant argues that this statement was a
reference to the armed robbery appellant
allegedly committed, and it should have
been excluded as improper evidence of oth-
er crimes. The jury was never informed of
the armed robbery of the gas station; and
thus, the jury was not aware that the "fel-
ony stop" was a reference to another crime.
The jury only could have presumed that the
officer made "a felony stop" for the crime
under consideration at trial. The trial
court correctly refused to instruct the jury
to disregard the officer's statement. The
instruction was not required and only
would have signaled to the jury that there
might have been another crime.

V

[5] Appellant also asserts that the vic-
tim's sister was ineligible to be a state
witness since she was a co-defendant. The
general rule is that "a defendant jointly
charged with others cannot, in a separate
trial of one of his [or her] co-defendants
testify for the state." *State v. Blevins*,
427 S.W.2d 367, 380 (Mo. 1968); *See* § 546-
250, RSMo 1978; Supreme Court Rule 27-
04. However, the rule against co-defend-
ants testifying against one another does
not control if the defendants were charged
in separate indictments. *State v. Haynes*,
510 S.W.2d 423, 424-25 (Mo. 1974); *State v.*
Nickens, 581 S.W.2d 99, 101, 02 (Mo. App.
1979). Since Harless and appellant were
charged in separate indictments, Harless
was not barred from testifying against ap-
pellant.

VI

[6] Appellant argues the additional evi-
dentiary claim that the trial court erred in
allowing testimony from two witnesses
that, in the days immediately preceding the
victim's departure from Kansas City, the
victim stated that she feared appellant was
going to kill her. The general rule is that
such statements of a declarant's present
mental condition made out of court are
excepted from the hearsay ban. *Hasl &
O'Brien*, Mo. Law of Evidence, § 11-18
(1984); *G. Wigmore*, Evidence, § 1714
(Chadbourn Rev. 1976); *State v. Huffman*,
659 S.W.2d 571, 574 (Mo. App. 1983); *State*
v. Singh, 586 S.W.2d 410, 417-19 (Mo. App.
1979). Ordinarily, however, such state-
ments are not admitted except in limited
situations when they are relevant and the
relevancy outweighs their prejudicial ef-
fect. *See United States v. Brown*, 490
F.2d 758 (D.C. Cir. 1974); *State v. Singh*,
586 S.W.2d at 419. Trial courts are in the
best position to determine the probative-
ness and prejudicial effect of the evidence.
State v. Kenley, 693 S.W.2d 79, 81 (Mo.
banc 1985). Under the facts of this case,
there was no abuse of discretion in permit-
ting this testimony.

VII

[7] Appellant avers that the trial court
erred in not granting an overnight continu-
ance immediately at the close of the State's
case. The question of whether a continu-
ance is appropriate is a discretionary mat-
ter for the trial court. *State v. Jordan*,
646 S.W.2d 747, 753 (Mo. banc 1983). A
strong showing is required to establish an
abuse of such discretion. *State v. Cucko-
vich*, 485 S.W.2d 16, 21 (Mo. 1972). In the
case at bar, appellant's counsel had indi-
cated to the court that he was ready to
proceed and had spent time with appellant
preparing the case. Counsel was fully
aware of the expected length of the trial.
After the state finished its case in chief,
counsel for appellant requested an over-
night continuance in order to prepare ap-
pellant's testimony. The court denied the
continuance but granted a 30 minute recess

and upon reconvening adjourned until the
following morning 9 a.m. Given these
facts, we believe that appellant, in fact,
obtained his requested continuance and
cannot now be heard to complain.

VIII

[8] Appellant contends that the imposi-
tion of death as punishment is always cruel
and unusual punishment under the Eighth
Amendment of the Constitution of the Unit-
ed States and Article 1, Section 21 of the
Constitution of the State of Missouri. The
United States Supreme Court has approved
the imposition of the death penalty when
criminal procedures are followed which as-
sure that the application of this punishment
is not discriminatory, wanton, or freakish.
Barclay v. Florida, 463 U.S. 939, 103 S.Ct.
3418, 77 L.Ed.2d 1134 (1983); *Eddings v.*
Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71
L.Ed.2d 1 (1982); *Godfrey v. Georgia*, 446
U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398
(1980); *Green v. Georgia*, 442 U.S. 95, 99
S.Ct. 2150, 60 L.Ed.2d 738 (1979); *Bell v.*
Ohio, 438 U.S. 637, 98 S.Ct. 2977, 57
L.Ed.2d 1010 (1978); *Lockett v. Ohio*, 438
U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973
(1978); *Roberts v. Louisiana*, 431 U.S. 633,
97 S.Ct. 1993, 52 L.Ed.2d 637 (1977); *Gard-
ner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197,
51 L.Ed.2d 393 (1977); *Woodson v. North*
Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49
L.Ed.2d 944 (1976); *Proffitt v. Florida*, 428
U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913
(1976); *Gregg v. Georgia*, 428 U.S. 153, 96
S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Jarek v.*
Texas, 428 U.S. 262, 96 S.Ct. 2599, 49
L.Ed.2d 929 (1976); *Furman v. Georgia*,
408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346
(1972). The statute under which appellant
was sentenced to death is modeled closely
after the Georgia statute which the United
States Supreme Court has declared constitu-
tionally adequate. *Gregg v. Georgia*, 428
U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859
(1976); *See Godfrey v. Georgia*, 446 U.S.
420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980);
Green v. Georgia, 442 U.S. 95, 99 S.Ct.
2150, 60 L.Ed.2d 738 (1979). This Court
also has consistently held that the capital
punishment statutes under which appellant

djourned until the a.m. Given these appellant, in fact, continuance and complain.

is that the imposition is always cruel under the Eighth Section 21 of the of Missouri. The court has approved ath penalty when followed which as of this punishment inton, or freakish. U.S. 939, 103 S.Ct. 1983; *Eddings v. 102 S.Ct. 869, 71 ry v. Georgia, 446 J. 64 L.Ed.2d 398 a. 442 U.S. 95, 99 38 (1979); Bell v. 8 S.Ct. 2977, 57 cket v. Ohio, 438 . 57 L.Ed.2d 973 ana, 431 U.S. 633, 637 (1977); Gard- 449, 97 S.Ct. 1197, foodson v. North 96 S.Ct. 2978, 49 711 v. Florida, 428 . 49 L.Ed.2d 913 . 428 U.S. 153, 96 9 (1976); *Jurek v. 6 S.Ct. 2950, 49 man v. Georgia, 35, 33 L.Ed.2d 346 r which appellant s modeled closely which the United s declared consti- j v. Georgia, 423 . 49 L.Ed.2d 3 corpia, 446 U.S. Ed.2d 398 (1980); U.S. 95, 99 S.Ct. 79). This Court i that the capital r which appellant**

was tried are not in violation of the Missouri or United States Constitutions. See e.g. *State v. Foster*, 700 S.W.2d 440 (Mo. banc 1985); *State v. Gilmore*, 697 S.W.2d 172 (Mo. banc 1985); *State v. Nave*, 694 S.W.2d 729 (Mo. banc 1985); *State v. Malone*, 694 S.W.2d 723 (Mo. banc 1985); *State v. Kenley*, 693 S.W.2d 79 (Mo. banc 1985).

IX

We now turn to our statutory mandated duty to review independently the sentence imposed by the jury. § 565.014.3, RSMo 1978. Appellant's final point is addressed herein.

Appellant does not contend his sentence was imposed by a jury or judge motivated by any arbitrary factor, and the trial court determined that the jury was not influenced by "passion, prejudice, or any other arbitrary factor when assessing punishment." Our independent review of the record substantiates the conclusion of the trial judge.

[9] To support the finding of an aggravating circumstance, we must find substantial evidence to support the jury's finding beyond a reasonable doubt. *State v. Battle*, 661 S.W.2d 487, 493 (Mo. banc 1983), cert. denied, 466 U.S. 993, 104 S.Ct. 2375, 80 L.Ed.2d 847 (1984). The jury found appellant killed the victim intending to eliminate a witness. § 565.012.2(10), RSMo 1978. This victim was a witness to a robbery committed by appellant, Vernon Wait, and another. Appellant and Vernon Wait decided to take the victim from Kansas City after they learned the police were looking for her. Several witnesses testified they heard Wait say he wanted to kill Jody Harless because of what she had seen, and Jill Harless, the victim's sister testified that on more than one occasion appellant said they had to get rid of the robbery witnesses. We find the evidence adduced at trial sufficient to support the statutory aggravating sentence found.

[10] Finally, we must consider whether the sentence imposed is excessive or disproportionate to the penalty assessed in sim-

ilar cases, considering both the crime and the defendant. § 565.014.3(3), RSMo 1978. We must examine all capital murder convictions except those where the State waived the death penalty. *State v. Bolder*, 625 S.W.2d 673 (Mo. banc 1982), cert. denied, 459 U.S. 1137, 103 S.Ct. 770, 74 L.Ed.2d 983 (1983). In our analysis, we compare the facts of the crimes together with the character and criminal history of the defendants. Although there was some evidence of alcohol or drug use by appellant, no mitigating circumstances were submitted to the jury. It is reasonable to conclude that appellant wounded the victim, she pled for her life, and then, while a companion flung and held her to the ground, appellant shot the victim in the head with a 12 gauge shotgun held close to her face. Comparable crimes and defendants, in which we affirmed the death penalty, include *State v. McDonald*, 661 S.W.2d 497 (Mo. banc 1983), cert. denied, — U.S. —, 105 S.Ct. 1875, 85 L.Ed.2d 168 (1985), in which a police officer was shot, wounded, then shot again at close range and killed, *State v. Newlon*, 627 S.W.2d 606 (Mo. banc 1982), cert. denied, 459 U.S. 884, 103 S.Ct. 185, 74 L.Ed.2d 149 (1982), reh. denied, 459 U.S. 1024, 103 S.Ct. 391, 74 L.Ed.2d 520 (1982), in which two shotgun blasts were used to kill the shopkeeper/robbery victim, and *State v. Malone*, 694 S.W.2d 724 (Mo. banc 1985), petition for cert. pending, in which a cabdriver was robbed, shot, and killed. Finding no similar cases in which the defendant received a life sentence, we conclude appellant's sentence of death is not disproportionate to that imposed in comparable cases.

The judgment of the trial court is affirmed.

HIGGINS, C.J., BILLINGS, DONNELLY and RENDLEN, JJ., and DOWD Sp.J., concur.

BLACKMAR, J., concurs in part and dissents in part in separate opinion filed.

ROBERTSON, J., not sitting.

BLACKMAR, Judge, concurring in part and dissenting in part.

I am unable to concur in the assessment of a death sentence in this case because of the admission of the testimony that the victim had said that she was afraid of the defendant.

I quite agree that, to the extent the victim's state of mind is material, her own declarations may be admitted under a recognized exception to the hearsay rule. My problem is that I am unable to see how her testimony that she feared the victim has any tendency to support an inference that he killed her. The statement has the vices of hearsay in that it cannot possibly be pierced by cross-examination. See *United States v. Brown*, 490 F.2d 758, 778 (D.C. Cir.1974); *State v. Miller*, 664 S.W.2d 229 (Mo.App.1983).

The state glibly cites *State v. Ford*, 639 S.W.2d 573 (Mo.1982); *State v. Jackson*, 663 S.W.2d 312 (Mo.App.1983) and *State v. Singh*, 586 S.W.2d 410 (Mo.App.1979) for the general proposition that the victim's state of mind is relevant. None is in point. *Ford* and *Jackson* involved claims of self-defense in which the court felt that the testimony of fear had a tendency to demonstrate that the victim was not an aggressor. *Singh* included a statement that the victim feared guns, by reason of which the jury might think it unlikely that she had taken up a firearm.

Here the defendant tendered a theory of accidental discharge not occasioned by the actions of the victim. The victim's statement about fear of the defendant does not logically refute this claim. The prejudicial effect in suggesting deliberation, premeditation, and possible disposition toward violence is made manifest. The principal opinion suggests that admission was a matter of discretion. Because there is no justifiable reason for admitting the evidence, any discretion was abused.

I am very much inclined to believe that the error did not prejudice the finding of guilty and that the conviction need not be reversed. I also believe that, if we are to have a death penalty, the death sentence is

not disproportionate to the cases cited in the principal opinion nor to *State v. Johns*, 679 S.W.2d 253 (Mo. banc 1984), even though there are quite a few more aggravated cases in which death was not decreed. When the state seeks the ultimate penalty, however, this Court should take a strict view of trial error. I would therefore set aside the death sentence and would remand the case for a new trial on the punishment phase, or for resentencing, such as the state might elect.



STATE ex rel. FAITH
HOSPITAL, Relator,

v.

Honorable Richard T. ENRIGHT,
Judge, Circuit Court, St. Louis
County, Respondent.

No. 67657.

Supreme Court of Missouri,
En Banc.

March 25, 1986.

Hospital brought original action in prohibition seeking to prohibit trial judge from allowing patients in malpractice action to discover peer review committee documents, credential committee documents and incident reports relating to physicians in underlying medical malpractice action. The Supreme Court, Robertson, J., held that: (1) agents were not entitled to discover peer review committee documents; (2) credential committee findings and deliberations were not exempt from discovery unless they specifically concerned health care provided patients; and (3) prohibition was not available to preclude trial court from allowing discovery of incident reports.

Order accordingly.

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,)
)
 Respondent,)
)
vs.) No. 66684
)
WILLIAM THEODORE BOLIEK, JR.,)
)
 Appellant.)

MOTION FOR REHEARING

Comes now appellant, by and through undersigned counsel, and pursuant to Rules 30.26 and 84.17 V.A.M.R., moves this Court to withdraw its opinion heretofore rendered and to rehear this cause. As grounds for said request, appellant submits that:

1. This Court's opinion, slip op. at 5-6, overlooks the material matter of fact, pointed out in Judge Blackmar's opinion concurring in part and dissenting in part, that Jody Harless's statement about fear of the defendant does not logically refute appellant's theory of accidental discharge not occasioned by the actions of Ms. Harless. The evidence in this case was that Ms. Harless had been shot twice, the first time in the stomach and the second time in the head. Ms. Harless's death resulted from the shot to the head. Slip op. at 2-3. Appellant claimed at trial that although he fired the first shot, he did not know the gun was loaded, and that the second shot was fired by Vernon Walt. Slip op. at 3. Because on appellant's theory he did not fire the killing shot, Ms. Harless's alleged statements that she feared appellant would kill her did not counter appellant's

testimony. Accordingly, such statements were : relevant for the purpose of refuting appellant's testimony, and, appellant submits the prejudicial effect of such statement otherwise militates against its admission.


2. This Court's opinion, slip op. at 5-6, indicates that this Court overlooked the material matter of law that a requirement for the admission of declarations of a decedent as to her state of mind is that such declarations be relevant. See, e.g., State v. Ford, 639 S.W.2d 573, 574 (Mo. 1982) ("Declarations of decedent demonstrating her state of mind, where relevant, are admissible," emphasis added); State v. Singh, 586 S.W.2d 410, 417 (Mo.App., S.D. 1979) ("...[T]he preponderance of authority is that, subject to limitations, the declarations of the decedent in a homicide case will be admitted to prove the decedent's state of mind where that is relevant," emphasis added). In this case, the declarations of the decedent were not relevant to any proper matter. Rather, as indicated in Judge Blackmar's opinion, such statements had the prejudicial effect of suggesting deliberation, premeditation, and a possible disposition toward violence. Accordingly, appellant contends that such statements were not admissible under the decedent's state of mind exception to the hearsay rule.


3. This Court's opinion, slip op. at 6, indicates that the principal opinion overlooked the material matters of fact that although the trial court, after granting appellant a thirty minute recess in which to review the state's evidence with his attorney prior to presenting the defense case, after reconvening

adjourned until the final morning, the trial court took such evening recess only after a lengthy discussion with defense counsel in the presence of the jury (Tr. 422-23). Moreover, as indicated in appellant's supplemental brief at 21-22, the negative effect of the trial court's reluctance to grant a continuance was magnified by the prosecutor's cross-examination of the appellant regarding the continuance (Tr. 468-69), and the prosecutor's closing argument in which he stated: "Here's a man whose [sic] gonna take his lies and flit 'em, and he had plenty of time. He needed plenty of time yesterday and today to prepare his testimony, even though he had had months and months to do so and had known what the evidence was many times" (Tr. 547). Appellant contends that the cumulative effect of the court's initial refusal to grant appellant a continuance, together with the discussion in the hearing of the jury, the prosecutor's cross-examination of appellant concerning the continuance, and his comment on the continuance in closing, was to punish appellant for exercising his constitutional rights to counsel and due process, and thus constituted an abuse of discretion on the part of the trial court.

WHEREFORE, for the reasons stated herein, appellant urges this Court to withdraw its opinion and grant a rehearing of this cause in order that the aforementioned issues may more fully and properly be presented to this Court for its consideration.

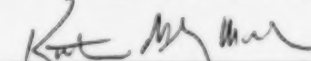
Respectfully submitted


Kathleen Murphy Markie
MOBar # 30438


Lew Kottias
MOBar # 28184
2098 East Green Meadows Rd.
Columbia, MO 65203-3698
(314) 442-1101

CERTIFICATE OF SERVICE:

I hereby certify that a true and correct copy of the foregoing motion was mailed postage prepaid this 4th day of April, 1986, and sent by way of first class mail to the Office of Attorney General, P.O. Box 899, Jefferson City, MO 65102.


Kathleen Murphy Markie



CLERK OF THE SUPREME COURT

STATE OF MISSOURI

POST OFFICE BOX 150

JEFFERSON CITY, MISSOURI

65102

THOMAS F. SIMON
CLERK

TELEPHONE
(314) 761-1141

April 15, 1986

Ms. Kathleen M. Markie
Mr. Lew Kolias
209 B East Green Meadows Road
Columbia, MO 65203

In re: State of Missouri vs. William Theodore Boliek, Jr. No. 6684

Dear Ms. Markie and Mr. Kolias:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"App.'s motion for rehearing overruled. Execution date set for June 19, 1986."

Very truly yours,

Clerk

cc: Attorney General
Warden, MSP
Office of the Governor
William Theodore Boliek, Jr.

No. 6684-

Circuit Court No. CR18 6F

In the Supreme Court of Missouri

January Term, 1986

State of Missouri,

Respondent,

vs. APPEAL FROM THE CIRCUIT COURT OF CAMDEN COUNTY

William Theodore Boliek, Jr.,

Appellant.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Camden County

rendered, be in all things affirmed, and stand in full force and effect, and that the said respondent recover against the said appellant its costs and charges herein expended, and have execution therefor. It is further considered and adjudged by the Court that the sentence pronounced against the said William Theodore Boliek, Jr.

appellant herein, by the said Circuit Court of Camden County be in all things executed on Thursday the 19th day of June, 19 86.

(Opinion filed.)

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 19 86, and on the 25th day of March, 19 86, in the above entitled cause.

Given under my hand and seal of said Court, at the City of

Jefferson, this 15th day of

June

Clerk D.C.

RELEVANT MISSOURI STATUTES

565.001, RSMo 1978. Capital murder defined.--Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder.